NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY *v.* WHITE, ADMINISTRATOR, ET AL.

SAME *v.* SAME.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF TENNESSEE.

Nos. 135 and 169. Argued January 11, 1929.—Decided February 18, 1929.

An ordinance requiring a railway company on every street crossed by its tracks to keep a flagman on duty to give warning of approaching trains by waving a flag in day time and a red lighted lamp at night, cannot be held to have become an unreasonable burden on interstate commerce, as applied to interstate trains, or so arbitrary as to amount to a denial of due process of law, because automatic devices of an approved modern type that are a better and cheaper means of protection have been installed by the railway, if there be reasonable ground for believing that compliance with the ordinance at the crossing in question would diminish the danger of accidents. P. 459.

Affirmed.

ERROR to and appeal from a judgment of the Supreme Court of Tennessee, affirming, with some modification, four judgments in as many personal injury cases. The writ of error was dismissed.

Mr. Fitzgerald Hall, with whom *Messrs. Frank Slemons and Walton Whitwell* were on the brief, for plaintiff in error and appellant.

That this ordinance was valid half a century ago—as no doubt it was—is immaterial. *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388. Electrical engineering, as well as railroading, was then in its infancy. A "human" flagman was all then known—a "mechanical" flagman was unknown.

As the ordinance directly affects both safety in operation and the expenditure of funds earned in inter-

state commerce, its validity is, in the last analysis, for this Court to determine. *Alabama etc. Ry.* v. *Jackson Ry.*, 271 U. S. 244.

Police powers may not be exerted arbitrarily. Intention, howsoever good, does not control. "The actual facts govern." *Sprout* v. *City of South Bend,* 277 U. S. 163. A State may not, even in the exercise of its police power, directly and seriously burden or unduly discriminate against interstate commerce or act unreasonably. *Colorado* v. *United States,* 271 U. S. 153; *Sanitary District* v. *United States,* 266 U. S. 405; *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298; *St. Louis-San Francisco Ry.* v. *Public Service Comm'n,* 254 U. S. 535; *LaCoste* v. *Louisiana,* 263 U. S. 545; *Chicago, etc. R. R.* v. *Wisconsin R. R. Comm'n,* 237 U. S. 220.

A state statute or a municipal ordinance may on its face appear perfectly valid, but when applied to a given state of facts, may become invalid. *Southern Ry.* v. *King* 217 U. S. 524; *Seaboard Air Line* v. *Blackwell,* 244 U. S. 310; *City of Acworth* v. *Western & Atlantic R. R.,* 159 Ga. 610.

To determine the federal question, a consideration of the facts was essential and therefore proper. *First Nat'l Bank* v. *Hartford,* 273 U. S. 548; *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389; *Chicago, Etc. R. R.* v. *Wisconsin,* 237 U. S. 220.

Since the layman does not understand the technicalities of railroad operation, the views of real experts must control. *Southern Pacific* v. *Berkshire,* 254 U. S. 415; *Chesapeake & Ohio* v. *Leitch,* 276 U. S. 429; *Toledo, etc. R. R.* v. *Allen,* 276 U. S. 165. Yet the trial judge excluded much of the evidence of those in position to know, such testimony being essential to a proper consideration and determination of the constitutional question here involved.

Such cases as *Erie R. R.* v. *Public Utilities Comm'n*, 254 U. S. 394, are irrelevant. There the State in the proper exercise of its police power was remedying a dangerous situation by the most modern method of crossing protection—the only point made by the railroad company was the enormous cost.

Mr. Walter P. Armstrong, with whom *Messrs. Julian C. Wilson, Elias Gates*, and *Wm. M. Colmer* were on the brief, for defendants in error and appellees.

Mr. JUSTICE HOLMES delivered the opinion of the Court.

These are actions brought against the plaintiff in error and appellant for causing the death of W. B. White and personal injuries to the other plaintiffs by running down an automobile at a grade crossing in the city of Memphis. The plaintiffs obtained judgments that were affirmed by the Supreme Court of Tennessee. W. B. White, who was killed, was driving the car, and his son, R. D. White, one of the plaintiffs, was sitting by his side. The Court states that both knew the Railway not to maintain a flagman and that they were grossly negligent in going upon the track. (*Baltimore & Ohio R. R. Co.* v. *Goodman*, 275 U. S. 66.) The Court held, however, that the proximate cause of the injuries was the Railway's failure to comply with an ordinance of Memphis requiring all railroads on every street crossed by their trains to keep a flagman constantly on duty, to give warning of approaching trains by waving a flag in daytime and a red lighted lamp by night, until the engine had crossed the street. The validity of this ordinance is the only question open before us here.

The Railway had substituted for the flagman an electric signal on one side of the street and about fifteen feet above it that gave warning by flashing a light and ringing a bell and was set in operation mechanically by the train when it came within 2,500 feet of the crossing. The contrivance

was testified to be in general use and was said to be cheaper and in some ways at least better than the old precautions. The Railway contended that the ordinance enacted at the beginning of 1880 was valid no longer in view of the modern improvement and that to enforce it now would be to enforce an unnecessary burden on interstate commerce and would be so arbitrary as to amount to a denial of due process of law. *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 400. (It may be mentioned that the train concerned was engaged in interstate commerce.) But the crossing in question was said by the Court to be a dangerous one where there was pretty constant travel by night and day, and it was held that as applied to such a crossing it could not be said that the ordinance was so indisputably unnecessary and unreasonable that the legislative judgment could be overruled.

We are compelled to take the same view. The legislative arguments in favor of the Railway are manifest and we may conjecture that it is only a matter of time before the old methods of guarding grade crossings will have disappeared unless the grade crossings precede them. But if the ordinance were passed today and came up for a decision upon its validity, it could not be denied that a man in the middle of the street or near to it and intent on stopping traffic might stop some travellers who might not notice electric signs. There is a marginal chance that occasionally a life may be saved. In this very case it is at least possible that a man on the ground would have stopped the plaintiffs, they not being intent on suicide. No doubt legislatures do neglect such marginal chances. Many modern improvements must be expected to take their toll of life. When a railroad is built experience teaches that it is pretty certain to kill some people before it has lasted long. But a Court cannot condemn a legislature that refuses to allow the toll to be taken even if it

thinks that the gain by the change would compensate for any such loss. It follows that we must affirm the judgments below. See *Zahn* v. *Board of Public Works*, 274 U. S. 325, 328.

There were some exceptions to the exclusion of evidence. But if they could be considered in any case they went only to proof that the new device is better than the old. We assume it to be so, but regard that assumption as not controlling the point considered here.

As appeal was the proper mode of bringing the cases to this Court the writs of error may be dismissed.

Judgment affirmed.

CUDAHY PACKING COMPANY *v.* HINKLE, SECRETARY OF STATE, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 278. Argued January 7, 1929.—Decided February 18, 1929.

1. State taxation of a foreign corporation admitted to do business in a State, in the form of a filing fee and a license tax, both reckoned upon its authorized capital stock, *held* a burden on interstate commerce, and an attempt to reach property beyond the jurisdiction of the State contrary to the due process clause of the Fourteenth Amendment, in a case where the property of the corporation within the State and the part of its business there transacted (less than half of it intrastate) were but small fractions, respectively, of its entire property and of its business transacted in other parts of the Union and abroad, and where the amount of capital stock authorized was much more than the amount of the stock issued and the value of the total assets. The laws imposing the taxes fixed maximum limits of $3,000.00 each; and the taxes actually demanded were $545.00 and $580.00, respectively. P. 465.
2. A state tax that really burdens the interstate commerce of a foreign corporation and reaches property beyond the State, cannot be sustained upon the ground that it is relatively small. P. 466.

24 F. (2d) 124, reversed.